

Issue: Group III Written Notice (damaging State property, failure to follow established written policy); Hearing Date: April 2, 2002; Decision Date: May 16, 2002; Agency: Mary Washington College; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5405



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5405

Hearing Date: April 2, 2002
Decision Issued: May 16, 2002

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice of disciplinary action for:

1. *Negligently damag[ing] state property – Namely cause damage to the locksmith pickup truck by attempting to drive the vehicle between two side walk barricades without ensuring their removal.*
2. *Failure to comply with established written policy – MWCPD operation manual 1.22 II B – Reporting damaged, lost, defective equipment.*

Grievant filed a grievance to challenge the disciplinary action.¹ The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 8, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 2, 2002, a hearing was held at the Agency's regional office.

¹ EDR Ruling 2002-052 consolidated a grievance filed by Grievant on November 7, 2001 and the grievance arising from the Group III Written Notice. No evidence was presented regarding the November 7, 2001 grievance, and, therefore, all relief sought by Grievant as part of that grievance is denied.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Sergeant
Locksmith Senior

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Mary Washington College employs Grievant as a Locksmith. He reports to the Locksmith Senior. His unit is located within the College Police Department which is managed by the Police Director. Grievant has many duties around the College campus including locking and unlocking doors to resident halls while students are on school breaks.

Grievant is the primary driver of a Police Department pickup truck. The truck is white with an approximately two inch blue banner encircling the vehicle. On each of the two doors is a logo about the size of a small plate containing a flag, an eagle, and the name of the college. The colors are red, white, and blue. Grievant has a set of keys to the truck. A second set of keys is located in a key box in the Police Director's office. The Police Director locks his office and only two people other than the Police Director have keys to the Police Director's office. A third set of keys is located in the locksmith's office. Only Grievant and the Locksmith Senior have access to that set of keys.

On Wednesday, November 21, 2001, Grievant was entrusted with the pickup truck for his duties. He went to two resident halls and locked their doors for the

Thanksgiving break.² On Sunday, November 25, 2001, he returned to those resident halls to open them for the returning students.³ During this period of time, damage was done to the right passenger side door of the pickup truck. A large vertical dent appeared beginning below the door handle and ending toward the bottom of the door. Grievant was the only driver of the vehicle during the period of time when the damage occurred.

A College mechanic noticed and reported the damage to the pickup truck. The College assigned the Sergeant to conduct an investigation. The Sergeant inspected the truck and noticed that the dent area had small scratches and rub marks consistent with a solid object coming in contact with the door and continuing to run down the side, also causing the dent. A small amount of reddish paint was present in front of the dented area.

The Sergeant obtained a copy of the police radio log which showed that Grievant had closed and opened certain resident halls during the Thanksgiving break. The Sergeant went to the road entrance for those halls. Four wooden posts protruding from the ground block off the road entrance. Each post can be removed from the ground enabling vehicles to pass through the road and closer to the resident halls. The Sergeant noticed that one of the posts had small amounts of white paint, red paint and dark blue paint. He looked at the red paint and the white paint and they appeared to be of the same color as the paint he found on the pickup truck. He angled the pickup truck next to the post and observed that the angle of the vertical dent in the door flowed with the height and size of the post. He concluded that the damage to the pickup truck was caused by someone trying to drive the truck around the post but instead hitting the post. Since Grievant regularly drove the pickup truck, Grievant was the likely suspect.

The Sergeant obtained samples of the paint from the post and from the pickup truck and sent them to the State forensic lab to see if the paint matched. Since no criminal charges were involved, the forensic lab did not test the paint. Although the wooden post was removed and placed in evidence, it was not presented to the Hearing Officer at the hearing.

Grievant observed the damage to the vehicle on Monday, November 26, 2001. He testified that he did not report the damage because he assumed it was caused by another police vehicle while the vehicles were parked tightly in the police parking lot. He assumed it was a police matter and the driver of the police vehicle reported it to the appropriate persons.

Grievant has a good driving record.⁴

² Agency Exhibit 6.

³ Agency Exhibit 7.

⁴ Grievant Exhibit 1.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” P&PM § 1.60(V)(B).⁵ Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” P&PM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” P&PM § 1.60(V)(B)(3).

“Willfully or negligently damaging ... state property ...” is a Group III offense.⁶ DHRM Policy 1.60 does not define negligence. In Gossett v. Jackson, 249 Va. 457, 554 (1995), the Virginia Supreme Court defined simple negligence “as the failure to exercise ‘that degree of care which an ordinary prudent person would exercise under the same or similar circumstances to avoid injury to another.’” (citations omitted). The Court added:

Negligence cannot be presumed from the mere happening of an accident. The burden is on the plaintiff to produce evidence of preponderating weight from which the trier of fact can find that the defendant was guilty of negligence which was a proximate cause of the accident. The evidence must prove more than a probability of negligence. The plaintiff must show why and how the accident happened. And if the cause of the accident is left to conjecture, guess, or random judgment, the plaintiff cannot recover.

Although the Gossett case dealt with private parties involved in a civil suit, the Court’s principles apply to negligence within the context of an employee grievance. The College has offered a theory of how the damage occurred to the vehicle; the problem with the College’s argument is that it remains a theory. Even though the College can establish that Grievant was likely in possession of the vehicle during the time of the damage, the remaining aspects of the event causing the damage remain speculative. Without forensic evidence showing that the red paint on the post is the same as the red paint on the truck, it is difficult to verify the accuracy of the College’s proposed scenario.⁷ Furthermore, it is possible for an individual to operate an automobile and to cause damage to that automobile, yet not be negligent in causing that damage.

⁵ The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM”) setting forth Standards of Conduct for State employees.

⁶ P&PM § 1.60(V)(B)(3)(c).

⁷ Possibly because of the difficulty of doing so, the College did not present to the Hearing Officer samples of the paint from the truck and from the post. Thus, the Hearing Officer could only rely on the judgment of the Sergeant that the two samples of paint appeared similar. Since red and white paints commonly appear throughout the College, it is difficult for the Hearing Officer simply to rely on the judgment of the Sergeant.

Therefore, the Hearing Officer concludes that the College has not met its burden of proof to show that Grievant was negligent.

“Failure to ... comply with established written policy” is a Group II offense.⁸ The College has a policy governing reporting damage to vehicles. Policy 1.09(N)(3)⁹ states:

At the beginning of a tour of duty, employees will examine any vehicle assigned to them and report any operational deficiencies, damage or defects to their supervisors. Failure to report damage or defects will create a presumption that the employee inspected the vehicle and found no damage or defects. The employee, in this case, will be held responsible for the damage.

Grievant observed damage to the pickup truck but he did not report the damage to his supervisor. Grievant failed to comply with the College’s established written policy, thereby justifying issuance of a Group II Written Notice.

Grievant contends he should not be held to the standard of having to memorize the College’s manuals, and, thus, should not be disciplined for failing to know the details of the policy governing reporting damage. Grievant’s argument fails for two reasons. First, damage to a police vehicle is an unusual event that should have led Grievant to question others regarding what to do about the damage. Second, Grievant assumed that the person causing the damage had already reported it. Grievant’s assumption shows he knew there must be some reporting obligation for the damage.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

⁸ P&PM § 1.60(V)(B)(2)(a).

⁹ Agency Exhibit 3.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer